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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

HOUSING RENAISSANCE FUND et al.,

Plaintiffs and Appellants,

v.

WILLIAM HABER,

Defendant and Respondent.

B216692

(Los Angeles County  
Super. Ct. No. BC403622)

APPEAL from an order of the Superior Court of Los Angeles County. Abraham Khan, Judge. Affirmed.

Mark S. Adams for Plaintiff and Appellants.

Law Offices of Timothy T. Tierney and Timothy T. Tierney for Defendant and Respondent.

Housing Renaissance Fund (HRF), Mark Adams (Adams)<sup>1</sup> and Los Angeles Housing Renaissance Corp. (the HRF defendants) brought this action against attorney William Haber (Haber) for malicious prosecution. Haber filed a special motion to strike pursuant to Code of Civil Procedure section 425.16 (section 425.16) which was granted by the trial court. HRF appeals this ruling.

We affirm.

## **BACKGROUND**

HRF is a private corporation in the business of “protecting the victims of unscrupulous landlords who fail to maintain habitable rental premises for the poor and needy tenants who need a safe place to live.” HRF carries out this purpose by purchasing deeds of trust on slum properties and then using the powers of the secured creditor to force the landlord to clean up the property.

### **1. The underlying litigation**

In May 2006, HRF’s predecessor in interest purchased a promissory note that was secured by a recorded deed of trust on property located at 101 N. Boyle Avenue, Los Angeles, California (the property).<sup>2</sup> This property was “a traditional meeting point for mariachis in Los Angeles, who congregate for work at Mariachi Plaza across the street.” HRF pressured Haber’s client, Asambleas, a California nonprofit corporation and owner of the property, to make the property safe for its residents. HRF joined forces with the property’s tenants to file a health and safety receivership petition in superior court. The receivership petition was voluntarily dismissed by HRF when the property was sold to a nonprofit housing agency which is currently attempting to rehabilitate the property. The voluntary dismissal took place in or about February 2007.

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<sup>1</sup> Adams is an attorney licensed to practice law in the State of California, and was at all relevant times an officer and director of HRF and its predecessor. Adams represented HRF in the receivership action against Asambleas de Dios Ebenezer (Asambleas).

<sup>2</sup> Shortly after purchasing the note and deed of trust, HRF’s predecessor assigned the note and deed of trust to HRF.

By the time HRF dismissed the receivership petition, Asambleas, though its attorney, Haber, had filed a cross-complaint against HRF for breach of contract. In addition, Asambleas filed a separate lawsuit against HRF, its assignor, and Adams. The lawsuit sought damages for intentional interference with economic relationship, injunctive and declaratory relief.

After HRF dismissed its action against Asambleas, Asambleas continued to prosecute its cross-complaint for breach of contract and its claims against the HRF defendants set forth in the separate Asambleas lawsuit. The two matters were consolidated. A mandatory settlement conference took place in October 2007, but settlement was not accomplished. Trial commenced on November 5, 2007. Other than Haber, no one representing Asambleas appeared or testified at the trial. At the end of Haber's presentation of its case-in-chief in both pending actions, the trial court heard and granted the HRF defendants' motion for judgment pursuant to Code of Civil Procedure section 631.8.<sup>3</sup> The court ordered that Asambleas take nothing on its first amended complaint for damages against the HRF defendants and that Asambleas take nothing on its first amended cross-complaint against cross-defendant HRF. The HRF defendants were awarded all costs, fees, and disbursements permitted by Code of Civil Procedure section 1033.5.

## **2. The malicious prosecution lawsuit**

HRF states that it suffered damages over and above the attorney fees it was awarded by the trial court. On December 10, 2008, the HRF defendants filed a complaint for malicious prosecution against Haber in superior court.<sup>4</sup>

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<sup>3</sup> Code of Civil Procedure section 631.8 permits a party to make a motion for judgment after the prosecuting party has completed his presentation of evidence. HRF has requested that pursuant to Evidence Code section 459, subdivision (a), we take judicial notice of: (1) the HRF defendants' motion for judgment on the pleadings; and (2) the HRF defendants' motion for judgment pursuant to Code of Civil Procedure section 631.8. The request is granted.

<sup>4</sup> In seeking to collect its attorney fees, HRF claims that it determined that Haber's client, Asambleas, had effectively abandoned the case and that Haber was operating on

Haber filed his special motion to strike pursuant to section 425.16 in February 2009. The motion was heard on March 20, 2009. The trial court granted the motion and ordered HRF to pay Haber \$10,000 as reasonable costs and attorney fees. The court analyzed HRF's opposing evidence and concluded that nowhere in that opposing evidence was there "competent evidence addressing what defense counsel knew about probable cause as to the underlying cases." In addition, the court concluded that there was "no evidence of the allegedly malicious retaliation." The court further opined that "counsel's observations of the absence of the client [Asambleas] in court relate to only speculative and equivocal inferences about whether counsel persisted with malice, because there are many reasons why a client might not appear in court, such as a strategic election, or the noncooperation of a client."

HRF filed its notice of appeal on May 19, 2009.

## **DISCUSSION**

### **I. Applicable law and standard of review**

A special motion to strike under section 425.16, also known as the "anti-SLAPP" statute, allows a defendant to seek early dismissal of a lawsuit involving a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." (§ 425.16, subd. (b)(1).) "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

Actions subject to dismissal under section 425.16 include those based on any of the following acts: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made

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his own in prosecuting the matter. Thus, the malicious prosecution claim was brought against Haber alone.

in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

“A SLAPP is subject to a special motion to strike ‘unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.’ (§ 425.16, subd. (b)(1).) Thus, evaluation of an anti-SLAPP motion requires a two-step process in the trial court. ‘First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citations.]” (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035 (*Nygard*).) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute--i.e., that arises from protected speech or petitioning *and* lacks even minimal merit--is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

“‘Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).) However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citations.]’” (*Nygard, supra*, 159 Cal.App.4th at p. 1036.)

## **II. The lawsuit is subject to section 425.16**

A malicious prosecution claim may appropriately be the subject of a section 425.16 motion to strike. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087-1088.)<sup>5</sup>

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<sup>5</sup> At oral argument, Adams raised the recent case *D.C. v. R.R.* (Mar. 15, 2010, B207869) \_\_\_ Cal.App.4th \_\_\_ [2010 Cal.App. LEXIS 340] (*D.C.*), in which Division One of the Court of Appeal, Second Appellate District held that certain derogatory and

### III. The “minimal merit” test

As set forth in *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260 (*Soukup*), the second step in evaluating a cause of action under section 425.16 is to determine whether the plaintiff has a probability of prevailing. To do so, the plaintiff “‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ [Citations.]” (*Soukup*, at p. 291.) As HRF emphasizes, “[t]he plaintiff need only establish that his or her claim has ‘minimal merit’ [citation] to avoid being stricken as a SLAPP. [Citations.]” (*Ibid.*, fn. omitted.)

To prevail on a malicious prosecution claim, “the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice. [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 292.) To establish the necessary “minimal merit” in an action for malicious prosecution, the plaintiff must make a prima facie showing of these elements.

“The question of probable cause is ‘whether as an objective matter, the prior action was legally tenable or not.’ [Citation.] ‘A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.’ [Citation.]” (*Soukup, supra*, 39 Cal.4th at p. 292.)

As to malice, this element “‘relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive.’

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threatening internet posts were not protected speech and did not concern a public issue. The *D.C.* court held that the trial court properly denied the defendants’ anti-SLAPP motion. Adams attempted at oral argument to equate the “cyber-bullying” at issue in *D.C.* with the malicious prosecution lawsuit in this matter. We disagree with this analysis and find the *D.C.* case to be inapplicable.

[Citations.]” (*Soukup, supra*, 39 Cal.4th at p. 292.) “Malice ‘may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause.’ [Citation.]” (*Ibid.*) “[A]n attorney may be held liable for continuing to prosecute a lawsuit discovered to lack probable cause.’ [Citation.]” (*Id.* at p. 296.)

#### **IV. Application of the evidence in this matter to the “minimal merit” test**

HRF argues that the evidence submitted in its malicious prosecution case “far exceeded” the minimal merit standard set forth in *Soukup*.

The complaint filed by Asambleas alleged interference with economic relations. Specifically, Asambleas alleged that HRF knew of Asambleas’s contract to sell the property and engaged in a course of conduct designed to induce Asambleas to breach that contract or to disrupt and delay performance of the contract. Such interference consisted of, among other things, HRF’s instruction to American Trust Deed Services Corporation not to accept payment in satisfaction of HRF’s deed of trust until dismissal of HRF’s lawsuit against Asambleas.

HRF did not present evidence suggesting that it did not carry out the actions alleged by Asambleas; that such actions did not negatively affect the sale; or that such actions did not amount to contractual interference. Thus, Asambleas’s claim of interference with contractual relations was, “‘as an objective matter, . . . legally tenable . . . .’” (*Soukup, supra*, 39 Cal.4th at p. 292.) We discuss each of HRF’s arguments to the contrary below.

HRF first argues that the sale of the property was completed at a substantial profit to Asambleas by the time Asambleas filed the lawsuit, and that any interference with the contract ceased as a matter of law in December 2006 when the sale closed.<sup>6</sup> However, the fact that the contract closed at a substantial profit to Asambleas does not suggest that

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<sup>6</sup> HRF also argued that all of HRF’s actions relating to the attempted foreclosure on the property were legally privileged under Civil Code section 2924, subdivision (d) relating to actions taken in a foreclosure by the trust deed holder. HRF has abandoned this argument on appeal.

Asambleas lacked probable cause for its interference with contractual relation claim. Despite the profitable close of the sale, Asambleas could still have suffered damages from HRF's actions.

HRF next focuses on Asambleas's alter ego allegations, claiming that these allegations were "baseless" and supported only by the fact that Adams and HRF shared a mailing address. However, behaving as an alter ego is not actionable in and of itself. Thus, one is not liable for being an alter ego of another entity unless that entity engages in some malfeasance. As discussed above, the malfeasance that Haber alleged was interference with contractual relations. HRF has failed to show that Haber and Asambleas lacked probable cause for this cause of action and therefore the malicious prosecution action was properly stricken under section 425.16. The ruling is proper regardless of whether the allegations of wrongdoing were directed towards the corporation or the individual acting as an alter ego.

As the trial court noted, the fact that Haber's client did not show up at trial is not relevant to the question of whether probable cause existed for the claim of contractual interference. The client may have been absent for any number of reasons, and HRF cites no authority for its position that such absence evidences a lack of probable cause.

As to HRF's claim that Haber produced no evidence of damages, we note that, in its complaint, Asambleas alleged that it "has not realized the benefits of its bargain in regard to the sale of all its properties" and "suffered additional damages in regard to legal expenses incurred in connection with its efforts to effect the pay off to defendants of the amount owed on the aforementioned promissory note and Trust Deed securing same, prior to close of escrow," thus supplying reasonable grounds for Asambleas's damage claims.

The evidence provided by HRF does not suggest a lack of probable cause for Asambleas's claims against HRF in the underlying litigation. Nor does it suggest that such claims were brought with malice. Thus, HRF's malicious prosecution cause of action does not meet the minimal merit requirement set forth in *Soukup*. (*Soukup, supra*, 39 Cal.4th at p. 292.)



## **V. The trial court’s evidentiary rulings**

In its order granting Haber’s special motion to strike, the trial court noted that it sustained “some of the moving party’s evidentiary objections filed with the reply (as indicated on a copy of the objections).” HRF argues that it is impossible for this court to review the trial court’s ruling sustaining “some” of the objections when they are not specified and the grounds for sustaining them are not stated. In its reply brief, HRF submits that the trial court’s failure to specify the basis for its decisions is in and of itself grounds to reverse its ruling.

HRF does not explain how the trial court’s failure to be specific about its evidentiary rulings has prejudiced HRF. In fact, in its ruling, the trial court set forth all four numbered paragraphs of Adams’s declaration in opposition to Haber’s special motion to strike. Thus, HRF cannot claim that the trial court improperly failed to consider any evidence set forth therein. We decline to address this argument further.

### **DISPOSITION**

The order granting the special motion to strike is affirmed. Haber is entitled to his costs of appeal.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
DOI TODD